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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

CASES:

A. T. & S. F. Ry. Co. v. *Interstate Commerce Commission*, 190 Fed. 591	9
Arizona Grocery Co. v. *A. T. & S. F. Ry. Co.*, 284 U.S. 370	9, 10
Pennsylvania Railroad Company, The v. *United States*, 363 U.S. 202	2
Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U.S. 433	9
United States v. *Western Pacific R. Co.*, 352 U.S. 59	9
War Materials Reparation Cases, 294 I.C.C. 5	6

STATUTES:

Interstate Commerce Act, 24 Stat. 379, as amended:	
Section 1(5), 49 U.S.C. 1(5)	2
Section 17(9), 49 U.S.C. 17(9)	2
28 U.S.C. 1336	2
28 U.S.C. 1398	2

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 139

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The report of the Interstate Commerce Commission (Pet. 1a-10a) is reported at 305 I.C.C. 259. The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. 11a-16a) is reported at 199 F. Supp. 586. The opinion of the United States Court of Appeals for the Third Circuit (Pet. 17a-25a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1963. The petition for a writ of certiorari was filed on May 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below was correct in sustaining the determination of the Interstate Commerce Commission that the charges sought by the petitioner railroad were unreasonable as applied in the particular circumstances of this case.

STATUTE INVOLVED

Section 1(5) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(5) provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property * * *, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

STATEMENT

Petitioner brought this action to obtain review of a determination made by the Interstate Commerce Commission, in the exercise of its primary jurisdiction on referral from the Court of Claims,[1] that certain freight charges sought by petitioner on government ship-

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[1] Petitioner's right to judicial review of the Commission's order in the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. 1336 and 1398, and § 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9), was decided in *The Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202.

ments made in 1941 and 1942 were, in light of th relevant circumstances, unreasonable.

The shipments consisted of 62 carloads of iron and steel articles which moved from interior points of origin in the United States to the port of New York for exportation to Great Britain as lend-lease materials. Tariffs in effect at the time of the shipments provided two sets of rates, domestic and export. The domestic rates were applicable to domestic shipments generally; the export rates, which were substantially lower, were applicable to shipments for export which were (1) delivered by the carrier direct to the steamer or steamer's docks and (2) did not leave the possession of the carrier at the port to which initially consigned. The shipments here in question moved on commercial bills of lading which clearly indicated that they were intended for export, and charges were prepaid at the export rates (Pet. 2a-3a). In addition, the shipping papers carried an Office of Defense Transportation "block permit", essential for the movement of all shipments for export, which showed that cargo space had been arranged prior to the rail movement (Pet. 5a-6a).

When the shipments reached the port of New York, they were unloaded in ground storage at railroad piers. However, because of enemy submarine activity off the Atlantic coast and other wartime conditions, they could not be loaded aboard vessels at New York for overseas destinations as intended. Subsequently, part of the shipments were forwarded by rail to Canada and the remainder were transported from New York by rail and exported from other ports. Consequently, the conditions of the tariff rule relative to export rates were not literally satisfied (Pet. 3a-4a).

Petitioner thereupon submitted to the government supplemental bills for additional freight charges based upon the difference between the export and domestic rates for the transportation from the interior points to New York. Upon audit, the General Accounting Office disallowed the supplemental charges, and petitioner sued in the Court of Claims to recover them. The court in turn referred to the Commission the question of the "proper charges to be applied to the shipments involved" (Pet. 2a).

The government did not challenge the reasonableness of the domestic rates *per se*, but, rather, maintained that charges based on the domestic rates, as applied in the extraordinary circumstances pertinent to these shipments, would be unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments between the same points. It relied upon the following facts: (1) the shipments were marked "for export" and were consigned to the British Ministry of War Transport; (2) charges were prepaid at the export rates; (3) arrangements for vessel space were made prior to shipment; (4) each shipment was in continuous possession of the carrier until forwarded from New York by rail; (5) all conditions of the export tariff were complied with, except actual delivery to shipside at New York; and (6) failure to export through the port of New York was due to conditions beyond the control of the parties (Pet. 3a, 4a-5a). The Commission agreed. The gist of its decision, as the court below observed (Pet. 6a-7a), was this:

> The question of the proper charges on "frustrated shipments" such as those here considered, has been before this Commission for determina-

> tion in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited an award of reparation was unopposed by the carriers. *The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements.* A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff. * * * (Emphasis added.)

In addition, the Commission pointed out that, effective December 28, 1942, after these shipments had moved, petitioner established a "frustrated freight tariff" which prospectively accorded the export rates to shipments encountering similar difficulties (Pet. 4a).

The district court set aside the Commission's ruling, holding that it had exceeded its authority because it had determined that the domestic rates were unreasonable on the basis of factors extraneous to transportation considerations (Pet. 14a-15a). The court of appeals reversed, reasoning that the Commission "properly has weighed all pertinent factors" and that what the Commission in fact had done was "to provide for just and reasonable charges" on these particular shipments, thus determining the issue of reasonableness "which Congress saw fit to entrust solely to the Commission" (Pet. 24a-25a).

ARGUMENT

1. The Commission's determination that the rates, as here applied, were unreasonable has a rational basis in the record, and the decision below, sustaining the Commission's order, raises no issue of general importance warranting further review.

Export rates on numerous commodities are characteristically lower than domestic rates covering shipments between the same points. The purpose of the differential, as the Commission has frequently noted,[2] is the generation or attraction of traffic which the railroads would not otherwise obtain. As is obvious, the tariff rules were designed to make certain that such "export" rates would apply only on traffic which was *bona fide* traffic for overseas shipment. In other words, the rules were devised to obviate the perpetration of fraud upon the railroads by the shippers' sending traffic between interior points purportedly for export, but in fact intended for domestic use, and thereby depriving the railroad of proper revenue on purely domestic traffic which it would otherwise carry as such.[3]

In the final analysis, the matter comes down to this. From the carrier's standpoint, the "frustration" of an export shipment due to conditions beyond the control of either party to the contract of shipment does not confer an additional burden. The same services are provided by it whether exportation takes place or

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[2] See, *e.g.*, *War Materials Reparation Cases*, 294 I.C.C. 5, 34-36.

[3] As pointed out by the Commission in *War Materials Reparation Cases*, *supra*, where lower "export" rates were established on shipments moving to the Pacific ports for exportation in order to meet competition of the alternate water routes to those ports, the "rules were designed * * * to make certain that such rates would apply only on traffic affected by the particular competitive conditions * * *." 294 I.C.C. at 36.

not and, in circumstances where the shipment constitutes *bona fide* export traffic while under rail movement, the carrier, upon receipt of the export rate, has procured all the benefits that it expected when it entered into the contract. The granting of an additional benefit—namely, the application of the higher domestic rate because war conditions rendered impossible either actual exportation or the performance of some other non-material condition—would have the sole effect of conferring a windfall.

From the standpoint of the shipper, the situation is the direct opposite. Having made the shipment to the New York port with the purpose of exportation, it quite properly relied on the carrier's representation that the goods would be carried at the lower export rate, a rate patently designed to foster the carrier's business by encouraging shipments of goods intended for export on the lines of the carrier. Denial of the benefits of this rate because intervening developments, occasioned by events over which the shipper had no control and having no bearing upon the services rendered by the carrier, prevented the achievement of the shipper's ultimate and unquestionably *bona fide* purpose, would heap an unwarranted penalty upon a shipper already disappointed by the frustration of his principal contract.

These shipments were *bona fide* export shipments when they were made. There was no intention to do anything other than have them placed aboard ship for transportation abroad; vessel space had been reserved; they remained in the carrier's possession upon arrival at the port of New York for delivery to shipside until their exportation from that port was "frustrated"; and, after necessary diversion to other ports, they were

in fact exported. The sole circumstance which prevented the export tariff from applying in terms was due to conditions entirely beyond the control of either party. Patently, there were no transportation factors involved which made these shipments domestic movements on which the domestic rates were automatically the "lawful", that is, reasonable, rates. On the other hand, there were, as we have noted, numerous transportation considerations which made charges based upon the domestic rates unreasonable as applied to these shipments.[4]

One might formulate the result reached by saying that the single unsatisfied condition upon which the application of the export rate depended, *i.e.*, loading the shipments on vessels at New York, was excused by an impossibility which was beyond the contemplation or the control of the contracting parties and that to impose an additional charge in these circumstances would be a misconstruction of the tariffs. Or one may state the proposition, as did the Commission and the court below, in these terms: that to apply the higher rate in these extraordinary circumstances would result in an unreasonable charge because it would

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[4] The administrative record, as pointed out in the Statement, *supra*, shows that the shipments were intended for export and were so marked; that shipping charges were prepaid at export rates; that arrangements for vessel space were made prior to shipment; that each shipment remained in the continuous possession of the carrier until it was found that exportation from the Port of New York was not possible; that all transportation conditions of the export tariff were complied with literally except actual delivery shipside; and that failure to export through that port was the result of conditions beyond the control of the parties. All of these are plainly "transportation considerations" to which the Commission looked and upon which the Court of Appeals relied in stating that the Commission "properly has weighed all pertinent factors."

make the rate dependent upon a fortuitous circumstance which was not designed, either by the rate maker or by the shipper, to govern the transportation performed.[5] Under either formulation, the result is the same.

2. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, and *A. T. & S. F. Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591 (Comm. Ct.), relied upon by petitioner (Pet. 8-10), are inapposite. In each of those cases, the Commission reduced to a prior level an increased rate established by the railroads for the transportation of a particular commodity. The Commission's reason, in each instance, was to assist an industry in its competition for markets. In this situation, it was held that the Commission exceeded its statutory authority when it condemned the rate for reasons having no relation to transportation considerations. It was in this context that this Court pointed out in *Southern Pacific* that the Commission erroneously failed to determine the intrinsic reasonableness of the rate. But in the present case the government was not seeking lower domestic rates on iron and steel articles. And, contrary to petitioner's conclusion (Pet. 12), the Commission did not "condemn" the domestic rates. As noted above, it had no occasion to do so, for the question presented involved no attack upon the domestic rate level.

Nor is there merit in petitioner's contention that the Commission's decision violated the rule of *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U.S. 370. There, this Court held that the Commission, by chang-

[5] See *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 68, where this Court indicated that the reasonableness of a tariff "as applied" was an issue for resolution by the Commission.

ing its view as to the reasonableness of a particular rate which it had previously prescribed as a reasonable maximum for the future, was not empowered to award reparations on shipments made under the outstanding tariff. Thus, the Court stated (284 U.S. at 390):

> Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and *upon the same or additional evidence as to the fact situation existing when its previous order was promulgated*, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by *what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.* [Emphasis supplied.]

Here, in contrast, the Commission has made no retrospective determination that rates previously determined to be reasonable might not be applied to past shipments. It has held, rather, that the domestic rates, which are concededly reasonable as generally applied, would be unreasonable if applied in extraordinary circumstances neither contemplated nor fairly deemed within their coverage. There is accordingly no conflict of decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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